Supreme Court, U.S.
FILED
OCT 12 1994
OFFICE OF THE CLERK

(2)

No. 94-464

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

THE NORTH CAROLINA RAILROAD COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The Court of Appeals Of North Carolina

BRIEF IN OPPOSITION

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NORFOLK SOUTHERN RAILWAY COMPANY,
PETITIONER

v.

THE NORTH CAROLINA RAILROAD COMPANY,
RESPONDENT

**ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF NORTH CAROLINA**

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent, The North Carolina Railroad Company, owns a railroad line and corridor across North Carolina, originating at Morehead City and terminating in

downtown Charlotte at Second Street (the "NCRR Right of Way"). Since the mid-1800's, the NCRR Right of Way has connected to the railroad line and corridor owned by Petitioner, Norfolk Southern Railway Company, to form a continuous railroad line continuing south from Second Street. This connection to the Petitioner's line occurs on a small parcel of land, owned jointly by Petitioner and Respondent, located on the south side of Second Street ("Lot A"). Lot A is contiguous to a larger tract of land, owned at all relevant times by Petitioner, encompassing most of the city block bounded by Second Street on the north and East Stonewall Street on the south ("the Subject Property"). Petitioner's railroad line extends south from its connection with Respondent's railroad line at Lot A, through the subject property, and then to points south. Petr.App. 4a.

Pursuant to a 99-year lease executed in 1895 ("the 1895 Lease"), Respondent leased the NCRR Right of Way to the Southern Railway, the predecessor of Petitioner. By virtue of this arrangement, a continuous railroad line has run across North Carolina on the Respondent's right of way to Charlotte, where it connected with the Petitioner's right of way on Lot A, and then continued through the subject property and the rest of downtown Charlotte, on to points south. Since the execution of the 1895 Lease, which expires by its terms on January 1, 1995, Petitioner has conducted all rail operations on

Respondent's line, and Respondent has conducted no rail operations. Petr.App. 4a-5a; 26a-27a.

In 1968 Petitioner and Respondent executed a new lease ("the 1968 Lease") for certain parcels of land located immediately north of the Subject Property and Lot A. Resp.App. 7a-9a. The NCRR Right of Way runs through these parcels. The 1968 Lease extended the 1895 Lease term for these parcels, but expressly excepted and reserved from its terms, and thereby left subject to the 1895 Lease, a forty foot wide right of way ("40 foot strip") for two railroad tracks to be located,

> such that the track or tracks to be included therein can be connected with track on land now leased by Lessee [Petitioner] from Lessor [Respondent] under said 1895 Lease at Trade Street on the northeast and track on land owned by Lessee on the southwest so as to form and maintain a continuous through track connection. . . .

Resp.App. 8a.

Simultaneously with the execution of the 1968 Lease, Respondent executed a deed ("the 1968 Deed") conveying its interest in Lot A to Petitioner. Petr.App. 5a; 27a-28a.

After executing the 1968 Lease and 1968 Deed, Petitioner continued to run trains over the NCRR Right of Way, through the parcels subject to the 1968 Lease over the 40 foot strip, over Lot A and the Subject Property, and over Petitioner's right of way to the south. In 1971 Petitioner recorded a plat depicting the 40 foot strip connecting Respondent's right of way to Lot A, the Subject Property, and Petitioner's right of way to the south. Petr.App. 5a.

In 1990 the City of Charlotte (the "City") developed plans to construct a new convention center on the Subject Property. On November 29, 1990, the City entered into a contract ("the 1990 Contract"), without the knowledge of Respondent, to purchase the Subject Property from Petitioner. Resp.App. 5a-6a. The 1990 Contract specifically reserved a railroad corridor 50 feet wide over the Subject Property along the then existing route of the railroad. On June 12, 1991, Petitioner and the City executed an amendment to the 1990 Contract ("the 1991 Amendment") providing that if Petitioner could obtain Interstate Commerce Commission ("ICC") approval for abandonment of its railroad line over the Subject Property, Petitioner would release the reserved 50 foot railroad easement to the City. Petr.App. 5a; Resp.App. 3a-4a.

In 1991 Petitioner filed with the ICC a Notice of Exemption for Abandonment of a 0.13 mile section of

track passing over the Subject Property. Petr.App. 16a. Respondent did not oppose Petitioner's request because of the Petitioner and City's representations and promises to preserve the railroad corridor through the Subject Property. On June 25, 1991, before the ICC reached a decision, Petitioner executed a deed ("the 1991 Deed") conveying the Subject Property to the City. Resp.App. 1a-2a. Consistent with the 1990 Contract, the 1991 Deed expressly reserved the existing railroad easement, corridor, and through track connection over the Subject Property. On July 16, 1991, the ICC ordered that the abandonment would become effective August 30, 1991. Petr.App. 16a. Respondent subsequently learned that Petitioner not only intended to abandon the railroad line over the Subject Property but that it intended to extinguish the railroad easement, and that the City intended to construct a new convention center on the Subject Property in a manner that prohibited railroad use of the corridor over the Subject Property.

On December 10, 1991, Respondent commenced this action by filing a complaint in Superior Court of Mecklenburg County, North Carolina, seeking a declaration of the Respondent's "right, title and interest in Lot A, the Subject Property, the Right of Way, and the Norfolk Southern railroad line. . . ." Respondent based its complaint on various express and implied agreements made by Petitioner and the City to maintain the railroad

corridor over Lot A and the Subject Property. Petr.App. 26a-31a.

Contemporaneously with the filing of its complaint, Respondent filed a petition before the ICC to reopen and reconsider the Petitioner's abandonment exemption. On February 18, 1992, the ICC denied Respondent's petition without a hearing and without taking any evidence. Petr.App. 20a. Respondent then voluntarily dismissed Count 9 of the complaint which requested the court to limit or prohibit the attempted abandonment.

In an order dated May 19, 1992, the Mecklenburg County Superior Court granted Petitioner's motion for summary judgment on Respondent's claims based on express contract and express easement,[1] but denied summary judgment with respect to claims of an "easement implied by reservation," an "equitable servitude in the nature of a railroad right of way," and implied contracts

---

[1] Respondent cross-appealed the trial court's granting of summary judgment on Respondent's express contract and easement theories. The North Carolina Court of Appeals found that this appeal was interlocutory. Therefore, the trial court's dismissal of the express contract and easement claims has yet to be considered by the North Carolina Court of Appeals.

to maintain a railroad connection or corridor.[2] The court also denied Petitioner's motion to dismiss for lack of subject matter jurisdiction and motions to dismiss the action for failure to state a claim on which relief could be granted. Petr.App. 12a-15a.

The trial court's denial of Petitioner's motion for dismissal for lack of subject matter jurisdiction was upheld by the North Carolina Court of Appeals in an opinion dated December 7, 1993. Petr.App. 3a-11a. The North Carolina Supreme Court dismissed Petitioner's appeal and denied its petition for discretionary review by an order entered on June 16, 1994. Petr.App. 1a-2a.

The section of railroad line extending over the Subject Property, which was abandoned subject to the abandonment proceeding and subsequently sold to the City by Petitioner, has been torn out and the City has substantially completed construction of the new convention center on the Subject Property.

SUMMARY OF ARGUMENT

This case simply involves application of the well-settled caselaw that abandonment of a rail line does not extinguish a railroad's prior contractual and property

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[2] In addition, there is an inverse condemnation claim for damages against the City that is still pending.

obligations, nor does abandonment prohibit those rights from being determined by state courts. This precedent is acknowledged by Petitioner in its petition for a writ of certiorari. Respondent initiated this proceeding to determine its contractual and property rights concerning Petitioner's railroad rail line and corridor in light of promises made to preserve the rail line and corridor. Respondent does not seek a reversal of the Interstate Commerce Commission's decision to allow abandonment of the track in question.

REASONS FOR DENYING THE WRIT

Petitioner has mischaracterized the nature of this litigation at all levels and continues to do so in its petition for writ of certiorari to this Court. Despite Petitioner's assertions to the contrary, Respondent has never demanded reconstruction or reconnection of the rail line abandoned by Petitioner. Petr.App. 28a-31a. Thus, the jurisdiction of the ICC has not been infringed upon, and there is no claim that implicates constitutional issues.

In its complaint, Respondent sought a declaratory judgment, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, of its state law rights that derive from written instruments and agreements between Respondent and Petitioner and from common law property rights. Specifically, Respondent sought a declaration of rights on eight separate and distinct claims: express rights to an easement

and express rights to a through track connection; Respondent's implied rights to the same; a negative easement over property in which Respondent has rights; and Respondent's express, implied, and third-party beneficiary contract rights in several written agreements. The trial court dismissed the claims based on express contract and easement but left standing the claims based on the implied theories. If Respondent is successful in the trial on the merits on those theories, Respondent will seek whatever remedies are available to it pursuant to N.C. Gen. Stat. § 1-259, which provides:

> Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

This statute authorizes a party to seek relief after a declaratory judgment action because "[n]one of the declaratory judgment statutes. . . require one seeking adjudication of contract rights to go further and seek an

enforcement of those rights. . . ." *Knotville Volunteer Fire Dept. v. Wilkes County*, 94 N.C. App. 377, 379, 380 S.E. 2d 422, *cert. denied*, 325 NC 432, 384 S.E. 2d 538 (1989). Among the remedies available to Respondent are damages for the diminished economic value of its line. Reconstruction of Petitioner's lines in such a way as to allow full rail operations is improbable, if not impossible, because of the ICC abandonment order, and because the new convention center sits atop the Subject Property and the railroad corridor.

Despite the availability of several damage remedies under state law, Petitioner continues to assert that Respondent's only request is for an order requiring reconstruction of the track abandoned by Petitioner, relief that Respondent has never requested. In its petition for writ of certiorari, Petitioner states:

> Under this decision, an interstate rail carrier could pursue and receive authorization from the Interstate Commerce Commission to abandon a line of railroad, yet still be subject to a putative duty under state law to maintain a track connection for the benefit of a state court claimant. Petr.Pet. 6.
>
> In the present case, respondent's complaint demands that North Carolina's state courts

declare that petitioner has a contractual obligation to maintain a "continuous through track connection between NCRR's line and NS' line." Petr.Pet. 8.

In fact, respondent's demand that an interstate rail carrier provide "a continuous through track connection" with petitioner necessarily implicates the duty to provide a track connection between the two railroads at some point. Petr.Pet. 9.

Respondent's demand for a connection between lines means a court must order that (1) the parties lines must connect somewhere, and (2) such a connection must be located so as to provide respondent with a rail corridor proceeding south from the southern terminus of respondent's line. Petr.Pet. 12.

Now respondent seeks a state-court declaration that petitioner must provide a connection at the very place where the Commission has authorized abandonment. . . . Petr.Pet. 15.

None of these statements has merit because Respondent has never asked the court to mandate a railroad service connection between Respondent's southern terminus and Petitioner's interstate line; never asked the court to reverse the ICC's approval of track abandonment; and, in fact, never asked the court to do anything that would invade the ICC's exclusive jurisdiction in matters of interstate commerce.

Respondent has mischaracterized the nature of this litigation in order to create a federal question arising under 28 U.S.C. § 1257(a), which provides that this Court may grant certiorari in cases involving a "title, right, privilege, or immunity . . . specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." The North Carolina Court of Appeals' decision in no way involves a question arising under the United States Constitution or any statute of the United States. The North Carolina Court of Appeals' (and the trial court's) decision merely dealt with reviewing the real property and contract claims asserted by Respondent and statutory construction of the grants of jurisdiction to the ICC.[3] This distinction was succinctly captured by the

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[3] The ICC's general grant of jurisdiction is set forth in 49 U.S.C. § 10501. Its specific jurisdiction over abandonment and discontinuance of railroad lines and rail

(continued...)

North Carolina Court of Appeals in its statement that "[t]he instant case turns on state law construction of written instruments, specifically the language of the 1968 lease, the 1968 deed and the 1990 contract herein, while the I.C.C. ruling applies to the abandonment of the railroad." 112 N.C. App. 762, 768, 437 S.E.2d 393, 396 (1993). While Petitioner successfully petitioned the ICC to abandon rail lines, it did not and could not, by virtue of its ICC abandonment petition, relieve itself of liability from the claims asserted in Respondent's declaratory judgment action.

There are no novel or unique questions involved in this case. This case can be decided under the well-established precedent of this Court that abandonment of a rail line does not extinguish a railroad's prior contractual obligations and property rights, nor does abandonment prohibit those rights from being determined by state courts. This precedent is cited by Petitioner in its petition for writ of certiorari where it states, "[a]s this Court has recognized, Commission authority over a carrier's right of way diminishes or ceases after

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[3] (...continued)
transportation is set forth in 49 U.S.C. § 10903. Neither section 10501 nor section 10903 grant any jurisdiction to the ICC over state law claims that do not involve interstate commerce.

abandonment, and carriers might have post-abandonment contractual obligations and property rights that are justiciable as a matter of ordinary contract and property law." Petr.Pet. 11, emphasis added. Petitioner cites *Central New England Railway Co. v. Boston & Albany Railroad Co.*, 279 U.S. 415 (1929), for the proposition that the ICC's abandonment order for a section of track did not purport to relieve a railroad of the contractual obligations it made relating to the abandoned track. This is the identical position taken by Respondent in this matter. Respondent initiated this proceeding to determine its contractual and property rights concerning the railroad right of way over the Subject Property in light of promises made to preserve the rail line and corridor. Respondent does not seek a reversal of the ICC decision to allow abandonment of the track.

Petitioner then goes on to state that "[i]n a more recent opinion, the Court held that the Interstate Commerce Act does not preempt state jurisdiction over rail property after the commission has authorized abandonment." Petr.Pet. 11. In support of this statement, Petitioner discusses *Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co.*, 467 U.S. 622 (1984). In that case, the Supreme Court held that a post-abandonment state court lawsuit for condemnation was not preempted by the Interstate Commerce Act. In *Hayfield Northern*, Chicago and North Western ("Chicago") successfully petitioned for abandonment of a portion of a

rail line over the objections of a group of shippers. The shippers then formed Hayfield Northern Railroad Co. and filed suit to condemn the rail property. Chicago sought dismissal based on preemption. On appeal, the Supreme Court rejected the preemption argument, noting that nowhere in the Act had the ICC been granted exclusive and plenary jurisdiction over railroad property after abandonment. To the contrary, "unless the Commission attaches postabandonment conditions to a certificate of abandonment, the Commission's authorization of an abandonment brings its regulatory mission to an end." As summarized by Petitioner, "[t]he Court held that the abandoned line did not remain under the Commission's jurisdiction after abandonment; therefore, the railroad's abandoned right of way and track could properly be subject to taking under a state condemnation proceeding." Petr.Pet. 12.

After citing these cases and explicitly acknowledging that carriers might have post-abandonment contractual obligations and property rights that are justiciable as matters of ordinary contract and property law, Petitioner states that "[in] the present case, petitioner has no alleged contractual obligation to respondent that could be imposed independent of the duty respondent alleges to provide a connection between petitioner's line and respondent's line." Petr.Pet. 12. This statement is in error and once again demonstrates Petitioner's mischaracterization of Respondent's claim. Respondent's

claim concerns state law contractual obligations and property rights based on promises and statements made to Respondent to the effect that the rail line and corridor would be maintained. The fact that the line has been abandoned is irrelevant to Respondent's pursuit of those claims.

The primary case relied upon by Petitioner in support of its writ for certiorari, *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), does not alter the conclusion that Respondent can pursue its contract and property claims in state court. *Kalo* properly held that state law claims based on the failure to maintain track and right of way on a line abandoned with ICC approval are preempted. However, the *Kalo* Court explicitly pointed out that, pursuant to 49 U.S.C. § 10103, state law claims may survive enactment of the Interstate Commerce Act so long as "'there is no administrative question involved.'" 450 U.S. at 328. (quoting *Pennsylvania R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915)). In *Puritan Coal*, the Supreme Court determined that the plaintiff could litigate the question of "whether the railroad had carried out the duties it had agreed to undertake," despite the Commission's rulings on administrative matters (emphasis added). Under *Puritan Coal*, Kalo Brick could have litigated state law claims against the rail carrier if the carrier had previously entered into an agreement with Kalo, as long as the remedies sought were not inconsistent

with an ICC ruling or prohibited under the Act. Additionally, the state statute addressed in *Kalo* concerned a rail carrier's obligation to provide service to a shipper, a matter squarely within the ICC's exclusive jurisdiction. By contrast, Respondent's claims in this case do not concern provision of railroad service, nor do they contest the ICC jurisdiction over abandonment of railroad lines, which ultimately concerns service. The ICC alone has jurisdiction over abandonment of interstate rail lines, while Respondent's state law claims simply concern a declaration of rights pursuant to contract and property principles. The jurisdiction of the ICC does not preempt Respondent's right to seek redress of its state law claims in state court. Since the Act and the state law claims exist for clearly different purposes and address different conduct, there can be no question as to the lack of preemption. Because Respondent does not seek any remedy inconsistent with the ICC's order allowing abandonment, and Petitioner explicitly agreed to provide certain rights to Respondent under written agreements and instruments, there can be no preemption.

CONCLUSION

All Respondent seeks to adjudicate are its rights pursuant to the contracts and agreements, express and implied, entered into between Respondent and Petitioner and the City. Respondent has never sought to have the court mandate the rail connection with Petitioner and has

not asked the state court to reverse the ICC's ruling on abandonment of the track in question. This case involves nothing more than the application of well-settled law to the facts of this case. Applying the well settled law in this case, the petition for writ of certiorari should be denied.

Respectfully submitted,

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October 17, 1994

APPENDIX

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APPENDIX A

1991 DEED

THIS INDENTURE made this 25th day of June, 1991, between

CHARLOTTE-SOUTHERN CORPORATION, a North Carolina corporation, and NORFOLK SOUTHERN RAILWAY COMPANY (formerly named Southern Railway Company), a Virginia corporation, together Grantors, parties of the first part; and

CITY OF CHARLOTTE, a North Carolina municipal corporation, Grantee, party of the second part:

WITNESSETH:

THAT the said Grantors, for and in consideration of the sum of TEN AND NO/100 DOLLARS ($10.00) and other good and valuable consideration in hand paid at and before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said Grantee, its successors and assigns, subject to the matters hereinafter provided the following described property, to wit, ...

Parcel 1

. . . .

Parcel 2

. . . .

Parcel 3

. . . .

LESS AND ACCEPT any railroad trackage located on the premises.

RESERVING unto Grantors, their successors and assigns, an easement or right of way for railroad purposes over and upon the premises; said easement being the same easement reserved by Southern Railway Company in that certain Indenture between Southern Railway Company and Charlotte-Southern Corporation, dated December 31, 1968, a memorandum of which is recorded with the Register of Deeds of Mecklenburg County in Book 3096, Page 280, and that certain Amendment to Indenture between Southern Railway Company and Charlotte-Southern Corporation, dated July 31, 1971, recorded with the Register of Deeds of Mecklenburg County in Book 3365, Page 21; said railroad easement area being called on such instruments the "Reserved 50-Foot Strip", reference to said instruments being hereby made in order to precisely determine the location and conditions pertaining to such railroad easements or right of way. . . . .

APPENDIX B

AMENDMENT TO CONTRACT OF PURCHASE AND SALE

This Amendment to Contract of Purchase and Sale is entered into effective the 12th day of June, 1991 between Norfolk Southern Railway Company (formerly named Southern Railway Company), a Virginia corporation, and Charlotte-Southern Corporation, a North Carolina Corporation, hereinafter together called "Seller"; and

The City of Charlotte, an instrumentality of government created pursuant to the laws of the State of North Carolina, hereinafter called "Purchaser",

. . . .

For good and valuable consideration, the receipt and sufficiency of which is acknowledged, the parties hereby amend the Contract as follows:

1. Seller agrees to make all good faith, reasonable efforts to obtain permission to abandon the section of railway track lying between the easterly boundary of E. 2nd Street and the westerly boundary of the bridge/underpass structure crossing E. Stonewall

Street (the "Red Track"). Seller will make appropriate filings for permission to abandon with the Interstate Commerce Commission and applicable government agencies on or before July 31, 1991. Purchaser shall make all good faith reasonable efforts to assist Seller in this regard if so requested by Seller.

2. The following is added as an additional sentence at the end of Paragraph 5(a) of the Contract:

Upon the latter of (a) the effective date of final authorization by the Interstate Commerce Commission for abandonment of the railway track within the reserved right of way; and (b) Seller's delivery to Purchaser or to Chicago Title Insurance Company ("Chicago Title") of the "Releases" (as defined in Paragraph 3 of this Amendment), Purchaser shall have the right to remove and retain the railroad trackage located within the reserved right-of-way, and Seller shall deliver a fully executed quitclaim deed or other similar instrument appropriate to reflect the extinguishment of the reserved easement interest and the conveyance of the subsequent reversionary interest to Purchaser.

. . . .

APPENDIX C

CONTRACT OF PURCHASE AND SALE

This Agreement, made and entered into this 29th day of November, 1990, between SOUTHERN RAILWAY COMPANY, a Virginia corporation, and CHARLOTTE-SOUTHERN CORPORATION, a North Carolina corporation, hereinafter together called "Seller", parties of the first part; and

The CITY OF CHARLOTTE, an instrumentality of government created pursuant to the laws of the State of North Carolina, hereinafter called "Purchaser", party of the second part;

WITNESSETH:

1. Seller agrees to sell and convey to Purchaser and Purchaser agrees to purchase from Seller, upon and subject to the terms and conditions hereinafter set forth, the land or property of Seller located in Charlotte, Mecklenburg County, North Carolina, containing in the aggregate 3.369 acres, more or less, together with the existing underpass structure crossing Stonewall Street,

. . . .

5. At settlement, the Seller shall convey to Purchaser by Special Warranty Deed, good and marketable title in fee simple to the Property, free and clear of any and all liens and encumbrances, except the following:

. . . .

e. A reservation by Seller unto itself, successors and assigns, of a perpetual easement or right of way for railroad purposes over and upon the Property; said easement being the same easement reserved by Southern Railway Company in that certain Indenture between Southern Railway Company and Charlotte-Southern Corporation dated December 31, 1968, a memorandum of which is recorded with the Register of Deeds of Mecklenburg County in Book 3096, Page 283, and that certain Amendment to Indenture between Southern Railway Company and Charlotte-Southern Corporation dated July 31, 1971, recorded with the Register of Deeds of Mecklenburg County in Book 3365, Page 21; said railroad easement area being called in such instruments the "Reserved 50-Foot Strip", reference to said instruments being hereby made in order to precisely determine the location and conditions pertaining to such railroad easement or right of way.

. . . .

APPENDIX D

1968 LEASE AGREEMENT

THIS LEASE AGREEMENT, made and entered into this 31st day of December, 1968, by and between the NORTH CAROLINA RAILROAD COMPANY, a North Carolina corporation, with its principal office and place of business in Raleigh, North Carolina, hereinafter called "Lessor", and the SOUTHERN RAILWAY COMPANY, a Virginia corporation, with its registered North Carolina office in Raleigh, North Carolina, hereinafter called "Lessee".

. . . .

In further consideration of the premises and the mutual promises and obligations herein contained, Lessor does hereby demise and lease to Lessee and Lessee does hereby take and hire from Lessor the following described real property (including the air rights), and other property rights located in the City of Charlotte, Mecklenburg County, North Carolina (hereinafter sometimes referred to as "Demised Premises"):

. . . .

Parcel No. 4

. . . .

RESERVING and ACCEPTING, however, from the foregoing demise and lease a surface area forty (40) feet in width and the air space over and above said surface area up to a height of twenty-three (23) feet above the top of any rail (except the portion thereof necessary, for supporting columns) as a right of way for two railroad tracks (hereinafter called "40-Foot Strip"), the exact location of such 40-Foot Strip to be determined by Lessee not later than January 1, 1972, provided that such exact location of the 40-Foot Strip by Lessee shall be such that the track or tracks to be included therein can be connected with track on land now leased by Lessee from Lessor under said 1895 Lease at Trade Street on the northeast and track on land owned by Lessee on the southwest so as to form and maintain a continuous through track connection, it being understood that all air space, other than that referred to in this Reserving and Excepting Clause, is, by this lease, leased and demised to Lessee. The parties hereto agree that Lessee will cause to be prepared an accurate survey of said 40-Foot Strip and will duly execute the same and cause the same to be recorded in the Office of the Register of Deeds for Mecklenburg County on or before January 1, 1972. The 40-Foot Strip reserved and excepted herein shall be and

continue subject to the rights of Lessee under the said 1895 Lease between Lessee and Lessor.

. . . .

APPENDIX E

49 U.S.C. § 10103

Section 10103 of Title 49, United States Code, provides:

> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.